Supreme Court, U.S.
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No. _____
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In The
Supreme Court of the United States

JUDY JOHNSON and JAMES EDWARDS,

Petitioners,

v.

ESTATE OF TERRY GEE, JR., DECEASED,
BY SPECIAL ADMINISTRATOR, THOMAS BEEMAN,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Can a jail official be deliberately indifferent to serious medical needs of an inmate and violate the Fourteenth Amendment where the official defers to treatment decisions of medical professionals working within the jail facility?

2) Did the Seventh Circuit properly deny qualified immunity where the court failed to address the "clearly established law" prong of qualified immunity analysis, and where the only decisions on point held that jail officials do not violate an inmate's constitutional rights by deferring to treatment decisions of medical professionals?

PARTIES TO THE PROCEEDINGS

The petitioners are jail officers Judy Johnson and James Edwards. The respondent is the Estate of Terry Gee, deceased, by its special administrator, Thomas Beeman.

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JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on February 16, 2010. The Seventh Circuit denied petitioners' petition for rehearing on April 15, 2010. App. 46-47. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens to the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

This is a Fourteenth Amendment claim alleging deliberate indifference to serious medical needs of a pretrial detainee incarcerated in a county jail.

Terry Gee was booked into the Monroe County (Indiana) jail on March 18, 2005. On March 30, 2005, Judy Johnson, a jail officer, was called to an inmate block by nurse Trina Estes. Estes expressed concern that Gee be placed in a medical segregation cell for medical observation. Gee had been treated by medical staff for two days before Johnson was so notified, and had contact with a jail nurse two to four times a day during his detention.

It was after 9:30 p.m. when Johnson was called to the cell block. She was advised that Gee was being treated by the adult nurse practitioner, Wygonda Rogers. Rogers had prescribed an antibiotic for Gee for a bacterial infection earlier that evening, and a double dose of insulin due to his high blood sugar level. Rogers had been treating Gee and was familiar with his condition. Estes administered the antibiotic and the double dose of insulin.

At Estes' request, Johnson approved Gee's transfer to the medical segregation cell. Gee was too weak to walk so Johnson ordered a wheelchair to transport Gee to the medical segregation cell. Estes also advised that Gee needed to be taking fluids so Johnson ordered a pitcher of water be placed in the medical segregation cell. Estes continued to check on Gee while in medical segregation until the end of her shift at 11:34 p.m., and did not expect Gee's condition to worsen.

Jail officers thereafter periodically observed Gee and recorded their observations on a log. The observations were that Gee was lying down and appeared to be resting.

Medical staff resumed seeing Gee during their 4:00 a.m. shift. Gee was seen in the segregation cell by nurse Gwen Sunkel at 4:24 a.m. and at 6:00 a.m. on March 31, at which times Sunkel administered medications to Gee, including another dose of the antibiotic.

At 7:15 a.m. on March 31, adult nurse practitioner Wygonda Rogers examined Gee in the medical segregation cell. She advised jail officer James Edwards that Gee needed to be taken to Bloomington Hospital for pneumonia observation, but did not indicate to Edwards that there was an emergency, nor that Edwards should call an ambulance. Edwards called the book-in desk and arranged for another jail officer to be taken off a transport assignment in order to drive Gee to the hospital. Gee was transported to the hospital and arrived there at 8:08 a.m. on March 31. He died on April 5, 2005, while still in the hospital.

The district court denied Johnson and Edwards' motion for summary judgment, acknowledging established law that a jail official is entitled to defer to the judgment of medical staff with regard to the appropriate way to treat an inmate, but concluding that Johnson and/or Edwards could be guilty of deliberate indifference for having "improperly deferred to the medical staff." App. 36. The district court also denied Johnson and Edwards' motion for summary judgment on grounds of qualified immunity.

Johnson and Edwards filed an interlocutory appeal to the Seventh Circuit, predicated upon denial of their request for qualified immunity. The Seventh Circuit affirmed the ruling of the district court, acknowledging that generally prison and jail officials may defer to medical professionals' decisions, but that an exception exists if the inmate's condition is "so obvious" that "deference to the nurses was

unreasonable." App. 12. The order of the Seventh Circuit did not address nor determine whether it was clearly established in March of 2005 that the conduct of Johnson and Edwards could violate the Fourteenth Amendment where the record shows that both deferred to and fulfilled directives from medical staff in connection with the staff's treatment of Gee's condition.

The panel below addressed the qualified immunity arguments of Johnson and Edwards in a single paragraph:

> Unlike the Medical Defendants, the Jail Defendants are clearly state actors, and they can assert qualified immunity. While the case is closer against the Jail Defendants, a jury could determine that they, too, were deliberately indifferent to Gee's medical condition. Johnson and Edwards argue that they were entitled to rely on the nurses' judgments, and generally prison officials can defer to medical professionals' opinions. *Burks v. Raemisch,* 555 F.3d 592, 595 (7th Cir. 2009). However, there is an exception when a risk to a prisoner's health is so obvious that a jury may reasonably infer actual knowledge on the part of the defendants. *Vinning-El v. Long*, 482 F.3d 923, 925 (7th Cir. 2007) (citing *Hall v. Bennett*, 379 F.3d 462, 464 (7th Cir. 2004)). This may be one of the rare cases where a layperson would recognize that Gee received treatment so inadequate that Johnson's and Edwards' deference to the nurses was unreasonable.

> *Johnson [v. Doughty]*, 433 F.3d [1001], at 1011 [(7th Cir. 2006)]. Gee was clearly in terrible shape, and he was deteriorating right before everyone's eyes. We agree with the district court that it is conceivable Johnson and Edwards should have realized that Gee needed immediate medical care, probably in a hospital.

App. 11-12.

A petition for rehearing was filed on the ground that the panel decision failed to address the core issue of whether the right was clearly established in 2005 as required under *Pearson v. Callahan*, 555 U.S. ___ (2009), and there was no controlling case law in March 2005 which held that jail officers can be liable for deliberate indifference despite deferring to determinations and directions of jail medical staff. The Seventh Circuit denied the petition for rehearing, without opinion, on April 15, 2010. App. 46-47. Whether the law was clearly established in March 2005 that jail officers can be liable for deliberate indifference where they defer to determinations made by medical staff remains unanswered.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition to determine under what circumstances, if any, non-medically trained correctional staff may be found deliberately indifferent to a prisoner's medical needs by failing to disregard or overrule treatment decisions of medical staff.

A. There is a conflict among the circuit courts concerning whether there are circumstances under which correctional officers are obligated to overrule medical staff and, if so, what conduct thereafter is constitutionally required.

In *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) the Court determined that "deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' ... proscribed by the Eighth Amendment." *Id.*, *quoting Gregg v. Georgia*, 428 U.S. 153, 173 (1976).[1] "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering

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[1] In this case, the decedent Gee was a pretrial detainee and therefore, any claim would arise under the Fourteenth rather than Eighth Amendment. However, the due process rights of Gee were at least as great as those available to convicted prisoners under the Eighth Amendment. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983).

with the treatment once prescribed." *Id.* (footnote omitted). The Court noted that an allegation of negligence or malpractice in the treatment of a prisoner's condition did not state a claim under the Eighth Amendment. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.*, 429 U.S. at 106.

Estelle involved a prisoner with a back injury who was seen 17 times over a three month period by prison medical staff without resolution of the back pain. *Id.* at 99-101. The district court dismissed the *pro se* complaint for failure to state a claim but the Fifth Circuit Court of Appeals reversed, ordering the claim reinstated. 516 F.2d 937 (5th Cir. 1975). The Court of Appeals agreed with the prisoner (Gamble) that more should have been done by way of diagnosis and treatment, including perhaps an x-ray of the back or other tests or treatments. 516 F.2d at 941. This Court held that such failure to pursue other avenues did not constitute deliberate indifference: "But the question whether an x-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment." *Estelle*, 429 U.S. at 107.

Gamble had also brought suit against the Director of the Texas Department of Corrections and the warden of the prison. Since the Court of Appeals had not separately considered the claims against those two individuals, this Court remanded the case to the Court of Appeals to consider whether a claim had been stated against them. After remand, the

Fifth Circuit affirmed dismissal of the two non-medical defendants, finding that they did not exhibit deliberate indifference by interfering with the doctor's performance, or in any other manner. *Gamble v. Estelle*, 554 F.2d 653 (5th Cir. 1977).

In *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3rd Cir. 1993), the Third Circuit held that two prison officials could not be held to have been deliberately indifferent in failing to respond to a prisoner's medical complaints when they knew he was already being treated by the prison doctor. The Third Circuit expanded on this holding in *Spruill v. Gillis,* 372 F.3d 218 (3rd Cir. 2004).

> If a prisoner is under the care of medical experts (Dr. McGlaughlin and Brown in this case), a non-medical prison official will generally be justified in believing that the prisoner is in capable hands. This follows naturally from the division of labor within a prison. Inmate health and safety is promoted by dividing responsibility for various aspects of inmate life among guards, administrators, physicians, and so on. Holding a non-medical prison official liable in a case where a prisoner was under a physician's care would strain this division of labor. Moreover, under such a regime, non-medical officials could even have a perverse incentive *not* to delegate treatment responsibility to the very physicians most likely to be able to help prisoners, for fear of vicarious liability.

> Accordingly, we conclude that, absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official like Gooler will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference.

372 F.3d at 236.

The Third Circuit also appears to hold that if a non-medical correctional official has a reason to believe that a prisoner is being "mistreated," his obligation under the Constitution is to review the inmate's complaints and verify with the medical staff that he is being treated. *James v. Pennsylvania Department of Correction*, 230 Fed.Appx. 195, 198 (3rd Cir. 2007), *citing Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005). No obligation to overrule the medical staff or to send the prisoner elsewhere for treatment seems to be present.

The Fourth Circuit addressed the right of non-medical correctional personnel to rely on the opinions of medical staff in *Miltier v. Beorn*, 896 F.2d 848 (4th Cir. 1990). In *Miltier,* the prisoner's estate brought suit against two wardens, alleging that they were liable, as supervisors, for the alleged deliberate indifference of medical staff.

> [I]t would be an unprecedented extension of the theory of supervisory liability to charge these wardens, not only with ensuring that Gwendolyn received prompt and unfettered

> medical care, but also with ensuring that their subordinates employed proper medical procedures – procedures learned during several years of medical school, internships, and residencies. No record evidence suggests why the wardens should not have been entitled to rely upon their health care providers' expertise. Moreover, everything in the record suggests that the wardens closely monitored Gwendolyn's health and ensured that she received medical treatment. *See Boyce [v. Alizaduh]*, 595 F.2d [948], at 953 [(4th Cir. 1979)]. Although record evidence suggests that the wardens were aware of Gwendolyn's deterioration, it would be ironic indeed if their awareness, resulting from close monitoring of Gwendolyn's condition, became the vehicle by which they were rendered liable under § 1983 for their subordinates' misconduct.

896 F.2d at 854-55. *See also Shakka v. Smith*, 71 F.3d 162, 167 (4th Cir. 1995) (noting that prison officials who contravene decisions of medical professionals risk liability for interfering with a prisoner's treatment).

The Seventh Circuit has also recognized that non-medical correctional personnel are entitled to rely on the opinions of medical professionals. *Lee v. Young*, 533 F.3d 505, 511 (7th Cir. 2008). *See also Hayes v. Snyder*, 546 F.3d 516, 526-27 (7th Cir. 2008); *Johnson v. Doughty*, 433 F.3d 1001, 1010-11 (7th Cir. 2006); *Greeno v. Daley, supra*, 414 F.3d at 655-56; *Burks v. Raemisch*, 555 F.3d 592, 596 (7th Cir. 2009)

("A layperson's failure to tell the medical staff how to do its job cannot be called deliberate indifference. . . ."). After the panel decision in this case, the Court reaffirmed this principle in *Berry v. Peterman,* 604 F.3d 435 (7th Cir. 2010).

> As *Hayes, Johnson, Greeno, Spruill,* and a host of other cases make clear, the law encourages non-medical security and administrative personnel at jails and prisons to defer to the professional medical judgments of the physicians and nurses treating the prisoners in their care without fear of liability for doing so.

Id. at 440.

In *Johnson v. Doughty, supra,* after holding that an officer who deferred to medical professionals was not deliberately indifferent, the Seventh Circuit cited a district court opinion with the following quote in parenthesis: "Except in the unusual case where it would be evident to a layperson that a prisoner is receiving inadequate or inappropriate treatment, prison officials may reasonably rely on the judgment of medical professionals." *Id.*, 433 F.3d at 1011, *quoting Bond v. Aguinaldo*, 228 F.Supp.2d 918, 920 (N.D. Ill. 2002). The "unusual case" exception appears to have been subsequently applied only in the panel's decision in this case.

The Eighth Circuit has also recognized that non-medical correctional personnel are entitled to rely on the diagnoses and medical judgments of trained

medical professionals. *Meloy v. Bachmaier,* 302 F.3d 845, 849 (8th Cir. 2002); *Drake ex rel. Cotton v. Koss,* 445 F.3d 1038, 1042-43 (8th Cir. 2006) (jailer not required to second-guess or disregard a psychiatrist's opinions or treatment recommendations).

After the panel issued its opinion in the instant case, the Eleventh Circuit decided *Townsend v. Jefferson County*, 601 F.3d 1152 (11th Cir. 2010). In *Townsend,* the Court held that two jailers were entitled to rely on the opinion of the jail nurse concerning whether a prisoner's condition constituted an emergency. *Id.*, at 1159. The Eleventh Circuit, however, indicated that the reliance may not have been justified if the jailers knew that the nurse had grossly misjudged the prisoner's condition, that they knew that the nurse was ignoring a serious medical need of the prisoner, or if they knew that the nurse had previously exhibited deliberate indifference in carrying out her responsibilities. *Id.*

The principle that non-medical correctional personnel are entitled to rely on the judgment of trained medical staff without incurring liability under 42 U.S.C. § 1983 has been recognized by the Third, Fourth, Seventh, Eighth and Eleventh Circuits. The Fourth and Eighth Circuits do not appear to recognize an exception to this rule. The Third Circuit recognizes an exception where the correctional official has reason to believe that the prisoner is being mistreated, but appears to hold that the only obligation of the official is to ensure that the prisoner is receiving treatment from the medical staff. The

Seventh Circuit may recognize an exception where it would be "evident" to a layperson that the prisoner is receiving inappropriate or inadequate treatment. The Eleventh Circuit would perhaps recognize an exception where either the official knows that medical staff has "grossly misjudged" the circumstances due to the obviousness of the prisoner's condition or if he knew or suspected that the medical staff was being deliberately indifferent.

The Court should grant certiorari to resolve the conflict between the Circuit Courts and to determine under what if any circumstances non-medically trained correctional staff may be found deliberately indifferent by failing to overrule trained medical staff who are in the process of providing treatment to prisoners, and to address the nature of their constitutional obligations once doing so. The case affords an excellent opportunity for the Court to address the issue because the evidence shows without dispute that Johnson and Edwards did not disregard but instead fulfilled the directives of medical staff.

II. The Court should grant the petition because the Seventh Circuit violated Supreme Court precedent by failing to address whether the law was clearly established in March 2005 that a jail officer violates an inmate's constitutional rights by not overruling determinations by medical staff.

A. The Seventh Circuit decision ignores Supreme Court precedent and fails to address the issue of whether the right was clearly established.

The essence of the defense of qualified immunity is that governmental actors are shielded from liability if their conduct does not violate a clearly established statutory or constitutional right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the

> law forbade conduct not previously identified as unlawful.

Id. (footnotes omitted). *See also Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they undertook). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, *Harlow*, 457 U.S. at 819, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). A right is clearly established for qualified immunity purposes only where the contours of the right are sufficiently clear that a reasonable official would understand that what the official is doing violates the right and, in light of pre-existing law, the unlawfulness of the act is apparent. *Id.* at 640.

In *Saucier v. Katz,* 533 U.S. 194 (2001), the Court established a two-prong methodology for determining questions of qualified immunity. First, the court is to consider whether, based on the facts alleged, the official's conduct violated a constitutional right. *Id.* at 201. If no constitutional right was violated, there is no need for further inquiry. *Id.* However, if the violation of a constitutional right could be established on the evidence submitted, the next step is to ask whether the right was clearly established at the time of the incident. *Id.* Again, the Court stressed that the "relevant, dispositive inquiry in determining whether

a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.*

Pearson v. Callahan, 555 U.S. ___ (2009) held that the two prong approach of *Saucier*, while often advantageous, is not mandatory. The Court found that, under appropriate circumstances, a court may bypass the first prong of the *Saucier* test (whether the conduct alleged violated a constitutional right) and go directly to the second prong of the test (whether the right at issue was clearly established under the law as it existed at the time of the conduct). In addressing the conduct of the officers in question, the Court in *Pearson* again emphasized that the relevant inquiry involved the law established at the time of the conduct. "This inquiry turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Id.* (slip op. at 18-19), *quoting Wilson v. Layne*, 526 U.S. 603, 614 (1999). Finding that the officers were entitled to rely on case law from other circuits and were therefore entitled to qualified immunity, the Court went on to state:

> The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law. Police officers

> are entitled to rely on existing lower court cases without facing personal liability for their actions. In *Wilson*, we explained that a Circuit split on the relevant issue had developed after the events that gave rise to suit and concluded that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." 526 U.S., at 618. Likewise, here, where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.

Pearson, 555 U.S. ___, ___ (slip op. at 19-20).

Nothing in *Pearson* suggests that if a possible constitutional violation is present, the second "clearly established" prong can be skipped. From *Harlow*, through *Anderson*, to *Saucier* and *Pearson*, the Court has made it clear that the dispositive question for assertion of qualified immunity is the state of the law at the time of the conduct at issue.

The panel decision appears to have turned the option offered in *Pearson* on its head. Rather than bypassing the first prong of the *Saucier* analysis and proceeding to the second prong, the panel addressed the question of whether the allegations could possibly make out a constitutional deprivation. It then ignored the second prong of the analysis, whether the conduct in question violated clearly established law. As such,

the dispositive question for purposes of qualified immunity was not addressed.

The panel decision contains no analysis of the state of the law at the time of the conduct in question, March 30-31, 2005. With the exception of a reference to *Hall v. Bennett,* 379 F.3d 462 (7th Cir. 2004), every case upon which the panel relied was decided after the events in question, *Burks* in 2009, *Vinning-El* in 2007, and *Johnson* in 2006. *Hall* was not a case involving medical care. In *Hall*, the Court held that a plant engineer and foreman electrician at a prison could be found to have been deliberately indifferent in ordering a prisoner to work on live electric wires without protective equipment since, given their expertise, the risk of such conduct was obvious. *Hall*, 379 F.3d at 464-65. *Hall* did not involve a non-expert officer who was in a position to overrule more qualified staff. No argument can be made that *Hall* clearly established the constitutional obligation of non-medically trained correctional officers to overrule the decisions of trained and experienced medical staff who were in the process of providing treatment to a prisoner and to take the prisoner elsewhere for treatment.

At best, the Seventh Circuit panel's reference to *Hall* stands for the unremarkable, general proposition that some risks to a prisoner's health and safety may be "obvious." The panel conducted no analysis into the question of whether the clearly established law in 2005 indicated that deferring to treatment decisions of trained medical staff was such

an obvious risk to the health and safety of the prisoner. The mere citation to *Hall* cannot be taken as a substitute for such analysis.

Nor did the panel make any determination as to whether, under the law as it existed on March 30-31, 2005, Johnson and Edwards were on notice that their conduct in deferring to the judgment of the trained and experienced medical staff who were treating the prisoner was clearly unlawful. Johnson and Edwards invited the panel to correct this defect in their petition for rehearing, but the panel declined the invitation.

Saucier held that if the court determines that the alleged conduct did not violate the Constitution, the inquiry could end. This holding is rational in that if the conduct in question did not violate the Constitution at the time of the decision, the case is ended on a basis other than qualified immunity and there is no need to inquire into clearly established law. But if the court makes a determination that the allegations could constitute a constitutional violation, there is no case from this Court, including *Harlow, Anderson, Saucier,* or *Pearson,* which authorizes a lower Court to deny qualified immunity without addressing the core issue of whether the asserted constitutional right was so clearly established that a reasonable official would understand that his conduct would violate that right. In other words, if a court conducts the analysis under the first prong of *Saucier* and finds a violation, but declines to perform the analysis under the second

prong, the defense of qualified immunity as defined by this Court has no meaning.

The decision of the panel of the Seventh Circuit in this case ignores the qualified immunity analysis as established by this Court in *Pearson*. The panel made no determination as to whether, under the law as it existed on March 30-31, 2005, Johnson and Edwards were on notice that their conduct in deferring to the judgment of trained and experienced medical staff was clearly unlawful. The Court should grant certiorari to ensure compliance with its decisions pertaining to the defense of qualified immunity.

B. There was no controlling case law in March of 2005 which put petitioners on notice that their conduct was clearly unlawful.

Neither the respondent nor the panel decision cited to any controlling authority which clearly established, as of March 2005, that the petitioners had a constitutional obligation (even in a rare case) to overrule the judgment of trained medical staff who were providing treatment. No case has been referenced wherein a correctional officer has been found to have been deliberately indifferent for not overruling the decisions of medical staff. No controlling authority which existed prior to the incident in question has been cited which would have indicated to Johnson or Edwards that this was even a possibility. "If the law did not put the officer on notice that his conduct

would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Saucier*, 533 U.S. at 202.

Of course, the general principle that deliberate indifference to the serious medical needs of a prisoner on the part of correctional staff constitutes "unnecessary and wanton infliction of pain" violative of the Constitution was clearly established. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

> This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards *in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.*

Id. (emphasis supplied) (footnotes omitted).

Accordingly, it was also clearly established that denying or delaying access to medical care could amount to deliberate indifference, as would interfering with treatment that had been prescribed. However there is no allegation that either Johnson or Edwards did anything to deny or delay Gee's access to the jail's medical staff, and the district court's opinion is devoid of any indication that such was the case. Gee was seen on a regular basis by medical staff well before either Johnson or Edwards entered the picture, and medical staff continued to treat Gee afterward. Nor are there any allegations that either Johnson or Edwards intentionally interfered with the treatment prescribed by the medical staff. Instead,

both carried out requests and followed orders issued by the medical staff.

A corollary to the established law has arisen in several circuits in the form of a general rule that, once the prisoner is under the care of qualified medical professionals, correctional officers are entitled to rely on the opinions of those medical professionals and will not be found to have been deliberately indifferent in doing so. This general rule was established law in the Seventh Circuit at the time of the conduct in question. *Perkins v. Lawson*, 312 F.3d 872, 875-76 (7th Cir. 2002). Conversely, the Seventh Circuit had clearly established that a correctional officer who disregarded the directions of medical professionals did so at his own peril. *Zentmeyer v. Kendall County, Illinois,* 220 F.3d 805, 812 (7th Cir. 2000) ("This is not to say that prison officials may substitute their judgment for a medical professional's prescription. Of course they cannot.").

The first case from the Seventh Circuit which indicated that there may be situations in which correctional staff could be found to be deliberately indifferent even while relying on the judgment of trained medical staff was *Johnson v. Doughty*, *supra*, decided in 2006 well after the events in question. *Johnson* repeated the general rule that non-medical correctional personnel are entitled to rely on the opinions of medical professionals in the treatment of the medical conditions of prisoners, *id.*, 433 F.3d at 1010-11, but also quoted the district court ruling in *Bond v. Aguinaldo, supra,* to the effect that there may

be an "unusual case where it would be evident to a layperson that a prisoner is receiving inadequate or inappropriate treatment," in which case it is unreasonable for prison officials to "rely on the judgment of medical professionals." *Johnson*, 433 F.3d at 1010 (*quoting Bond,* 228 F.Supp.2d at 920).

District court opinions do not clearly establish law for purposes of qualified immunity. *Anderson v. Romero*, 72 F.3d 518, 525 (7th Cir. 1995). The district court in *Bond* cited to *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3rd Cir. 1993) and to two other district court opinions as authority for the general rule that correctional officers may rely on their medical staff. *Durmer* merely states that prison administrators cannot be found to be deliberately indifferent by not responding to medical complaints from an inmate under the care of the prison doctor. *Durmer,* 991 F.2d at 69. Both of the district court cases cited by the court in *Bond* reflect the general rule authorizing reliance on medical staff, but contain no reference to an exception in "unusual cases." *See Williams v. Cearlock*, 993 F.Supp. 1192, 1197 (C.D. Ill. 1998) ("Prison administrators, having no medical expertise, must rely on healthcare professionals to assess the needs of prisoners and initiate treatment."); *McEachern v. Civiletti,* 502 F.Supp. 532, 534 (N.D. Ill. 1980) ("Defendants' reliance upon the opinion of their medical staff as to the proper course of treatment for plaintiff is sufficient to insulate them from any liability under the eighth amendment."). Apparently, the district judge in *Bond* speculated that there may be

unusual cases where the rule would not apply. But *dicta* in one district court decision does not constitute clearly established law.

Again, this is not a case where medical staff was not treating Gee, nor did Johnson or Edwards possess facts which show that the course of treatment by medical staff constituted "mistreatment" of Gee's condition. *Spruill, supra,* 372 F.3d at 236. Nor did opinions from other circuits pre-March 2005 refer to an "unusual case" exception to the rule that prison officials are not deliberately indifferent if they rely on decisions by medical providers. *Miltier v. Beorn, supra; Shakka v. Smith, supra; Meloy v. Bachmeier, supra.*

This Court has not addressed the issue of the degree to which non-medically trained correctional staff are entitled to rely on the opinions and judgment of trained medical staff. That there may be "unusual cases" where a correctional officer had a constitutional obligation to monitor and second-guess the treatment decisions of professional medical staff was not clearly established in the Seventh Circuit by any means. While *Spruill* left open the possibility that there may be cases where a correctional officer is not entitled to rely on the decisions of medical staff where a prisoner is either not being treated or is being mistreated, that opening did not appear in the decisions of other circuit courts. Nor do the facts in this case indicate that either Johnson or Edwards knew that the medical staff were "mistreating" Gee so as to come within that exception. There was no

clearly established law which would have put Johnson or Edwards on notice that, based upon the facts in their possession, the Constitution required they overrule medical staff while staff was in the process of providing treatment to a prisoner. Neither the Seventh Circuit nor the respondent has cited any authority which indicates that such a constitutional obligation was clearly established at the time.

The Court should grant certiorari to either require the Seventh Circuit perform the analysis required under *Pearson* of whether the petitioners violated clearly established law or, in the alternative, to conduct such inquiry itself.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 13, 2010

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 9, 2009
Decided February 16, 2010

Before

TERENCE T. EVANS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

SAMUEL DER-YEGHIAYAN, *District Judge**

Nos. 09-1895 and 09-2084

ESTATE OF TERRY GEE, JR., Deceased, by Special Administrator, Thomas Beeman,
Plaintiff-Appellee.

v.

JUDY JOHNSON, Captain, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:06-CV-00094-WTL-TAB

William T. Lawrence, *Judge*.

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* The Honorable Samuel Der-Yeghiayan, United States District Judge for the Northern District of Illinois, sitting by designation.

ORDER

Terry Gee developed pneumonia while being held as a pretrial detainee in the Monroe County (Indiana) jail. He arrived at the jail on March 18, 2005. Thirteen days later, on March 31, he was transferred to a hospital. He died at the hospital five days later on April 5. The cause of death was "progressive respiratory failure related to adult respiratory distress syndrome and perhaps fluid overload from renal failure."

Gee's Estate brought suit under 42 U.S.C. §§ 1983 and 1988 against two sets of defendants for failure to provide adequate medical care during Gee's 13 days of incarceration at the jail: Bloomington Hospital and Health Care System, Inc., Wygonda Rogers, Jennifer Anderson, Trina Estes, and Gwen Sunkel (the Medical Defendants); and Monroe County jail officers Captain Judy Johnson and Sergeant James Edwards (the Jail Defendants). The Estate also filed claims under state law against the Medical Defendants. Both sets of defendants brought motions for summary judgment, asserting qualified immunity defenses. The district court denied the motions. The defendants bring this interlocutory appeal, arguing that the district court erred in denying their motions. We begin with the facts, which do not appear to be disputed.

Prior to Gee's detention, Bloomington Hospital contracted with the Monroe County sheriff to provide medical care to county jail inmates. The hospital agreed to provide a jail doctor, a nurse practitioner,

and four licensed practical nurses (LPNs) to care for the inmates on a seven-days-a-week basis. The hospital was also expected to provide emergency care when needed. At the time of Gee's detention, Rogers served as the jail's nurse practitioner. Anderson, Estes, and Sunkel were three of the four LPNs. Rogers typically worked weekdays and the LPNs covered morning and evening shifts. None of the nurses worked between 11 p.m. and 4 a.m., but some of the jail officers were trained EMTs. In addition, jail officers were required to complete two 40-hour training sessions, which included a class on medical considerations for inmates. Dr. Tim Alward was the jail doctor at the time. He served a supervisory role and worked a minimum of five hours a week at the jail. Dr. Alward was usually on call to consult on individual cases, but he was on vacation during the last week of Gee's detention.

Gee was booked into the jail on March 18, 2005, following arrest on a theft charge. He had been held in the jail on prior occasions and was a known diabetic and schizophrenic. Rogers ordered that Gee receive a diabetic diet and insulin injections and have his blood sugar level checked twice a day. The nurses contacted Gee's mother regarding other medications he may have been taking. Gee's mother subsequently brought his prescriptions to the jail, and they were administered regularly. During Gee's detention he had contact with a nurse two to four times a day, though he refused insulin injections at times.

A week after Gee entered the jail, Mark Estanislau became his cellmate. Gee complained to Estanislau that he did not feel well and was in pain; as a result, Gee was not eating much of anything. According to Estanislau, Gee said he did not want to get Estanislau sick. Over the next few days, Gee's health went into a rapid decline: he was falling out of bed, pacing in circles, and suffering from severe back pain. Estanislau says that Gee asked his mother to urge the staff to send him to the hospital. Estanislau also notes that he and other inmates repeatedly told the medical staff and jail officers about Gee's condition and said he needed to go to the hospital.

A couple of days after Estanislau and Gee became cellmates, Gee sought treatment from Rogers. He was coughing and had a sore throat and a temperature of 100.3 degrees. Rogers believed Gee had the flu and prescribed Benadryl, Robitussin, and Tylenol.

The next day, during the morning medication pass, Anderson noticed that Gee was unsteady on his feet and seemed dizzy. As Anderson checked his blood sugar level, Gee started falling to the floor, and Anderson helped him get into bed. Gee had a fever of 103.7 degrees, a high heart rate, and a respiration rate of 30 breaths per minute.[1] Anderson contacted Rogers, who told her to give Gee some Tylenol to

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[1] The average adult has respirations of 12-20 per minute at rest and 35-45 during strenuous exercise. http://en.wikipedia.org/wiki/Respiratory_rate (last visited January 15, 2010).

reduce his temperature. His blood sugar, however, remained high, which Anderson attributed to the fact that Gee refused breakfast.

Later that morning, Rogers visited Gee, who complained of back pain and a sore throat. He had a temperature of 100.2 degrees. Rogers concluded he still had the flu and ordered Tylenol, Hydrocodone, Guaifenesin, rest, and fluid intake. When Gee's mother called Rogers to tell her that Gee needed to go to the hospital, Rogers said she was treating Gee's symptoms.

The following day, Anderson visited Gee to check his blood sugar and administer his medications. When Estes relieved Anderson of her shift, Anderson says she told Estes that Gee had the flu. Estes spoke to Gee on the evening medication pass about the importance of taking his medication, getting rest, eating, and drinking fluids. She also checked his breathing, which was short and rapid, and his blood sugar, which was high, even for a severe diabetic like Gee. Estes called Rogers, expecting her to send Gee to the hospital. However, Rogers said she had been treating Gee, and upon hearing his symptoms she concluded that he had a bacterial infection. Rogers prescribed Keflex, an antibiotic, and asked Estes to check Gee's blood sugar again on the evening medication pass. If it exceeded a certain level, Estes was to administer a double dose of insulin.

On the evening pass, some of the inmates, including Estanislau, allegedly told Estes that Gee

had not eaten for several days and had passed out that morning. Estes told Gee he needed to eat, drink fluids, and take his insulin. She checked Gee's blood sugar level, which had dropped but was still high, so she gave him a double dose of insulin as well as a double dose of Keflex.

Estes called for Captain Johnson and recommended placing Gee in medical segregation for observation. Johnson admits she overheard inmates saying Gee was sick and not eating and they did not want to catch the flu from him. However, she denies that the inmates said Gee needed to go to the hospital. Johnson approved Gee's transfer to medical segregation and signed an order which stated that Gee had an extremely high blood sugar level and a respiratory condition. Gee was too weak to sign the paperwork or walk, so Johnson wheeled Gee to the segregation cell where Estes and jail officers monitored him. They noted that he was lying down and seemed to be resting. Estes finished her shift around 11:30 p.m., not expecting Gee's condition to worsen.

The next morning, March 31, Sunkel was on duty. On the first medication pass, Sunkel gave Gee his prescriptions and tried to persuade him to eat, but she only succeeded in having him drink half a glass of milk. Gee was pale and ashy in appearance and seemed tired and weak, but Sunkel, like the other nurses, believed he had the flu. A couple of hours later, Gee was sleeping and had not eaten. Sunkel gave him additional medications, including Keflex, and noted he was responsive to verbal commands.

About an hour later, Rogers visited Gee and noticed he was dusky and kind of gray in color, which suggested he had a respiratory problem. Rogers believed Gee had developed pneumonia, and she told Sergeant Edwards that Gee needed to go to the hospital. When an officer arrived to take Gee to the hospital a half hour later, Gee was disoriented. He had to be wheeled to the van. Upon arriving at the hospital, the officer sought help in the emergency room. When he returned to the van, Gee was no longer breathing. Gee was taken into the emergency room, where doctors found that Gee had a severe case of pneumonia, his kidneys were not working properly, and he was in critical condition. He died at the hospital five days later, on April 5, 2005.

Several experts who examined Gee's treatment records concluded that his symptoms clearly indicated a need for immediate medical attention and that he should have been taken to the hospital much sooner than he was. They believe Gee received inadequate medical care at the jail. Dr. Alward also testified that Gee should have been taken to the hospital sooner, and Rogers admits, in retrospect, she should have handled things differently.

We review orders denying claims of qualified immunity under the "collateral order doctrine." *Sain v. Wood,* 512 F.3d 886, 890 (7th Cir. 2008). Qualified immunity protects government officials from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). A two-part test determines whether qualified immunity exists. Courts look at whether the facts alleged show that the defendants violated a constitutional right, and then they decide whether the right was clearly established. *Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151 (2001). We need not address the two prongs in sequence. *Pearson v. Callahan,* 129 S. Ct. 808, 818 (2009).

As a threshold matter, the Estate contends that the Medical Defendants are not entitled to invoke qualified immunity because they are not "state actors." Although in some cases private defendants can claim qualified immunity, this is not one of those cases. In making that determination, we consider the immunity historically accorded the relevant official at common law and the interests behind it. *Malinowski v. DeLuca,* 177 F.3d 623, 627 (7th Cir. 1999) (quoting *Butz v. Economou,* 438 U.S. 478, 508, 98 S. Ct. 2894, 2912 (1978)). But the Medical Defendants fail to provide any evidence that prison nurses (or private hospitals) have historically enjoyed qualified immunity.

Instead, the Medical Defendants argue that they can assert the defense based upon their performance of a governmental function. However, we do not use a functional approach to determine qualified immunity, "especially for a private person who performs a job without government supervision or direction." *Richardson v. McKnight,* 521 U.S. 399, 408-409, 117 S. Ct. 2100, 2106 (1997). The Court in *Richardson* denied the defense of qualified immunity to privately

employed prison guards, making special note of the context in which the case arose: a private firm "systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government. . . ." The Court left open the question of whether a private individual "briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision" could assert qualified immunity. *Id.* at 413. The Medical Defendants in our case are in a position that is fairly analogous to that of the defendants in *Richardson*. Their association with Monroe County was not brief, and it seems they performed their jobs with little to no supervision from the Monroe County sheriff Stephen Sharp, the elected sheriff at the time of Gee's death, maintains that, according to the contract, the hospital was "acting as an independent contractor and not in the capacity of an agent or under an employment relationship with the jail or the county," and the nurses "served as independent contractors for the Monroe County sheriff, not as agents, servants or employees of the sheriff."

So, if push came to shove, we might very well conclude that the Medical Defendants here are not entitled to claim qualified immunity. But push has not come to shove. We need not definitively decide the issue. Like the district court, we take a pass because even if the defense could be claimed by the Medical Defendants, it would be rejected on the merits in this case.

Inmates have a constitutional right to receive adequate medical treatment. *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S. Ct. 285, 290 (1976). Because Gee was a pretrial detainee rather than a convicted prisoner, the Estate's claim falls under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment, but the standards are pretty much the same. *Velez v. Johnson,* 395 F.3d 732, 735 (7th Cir. 2005). To ultimately succeed on its § 1983 claim, the Estate must show deliberate indifference to Gee's medical needs, which involves proving both an objective component – a sufficiently serious medical need – and a subjective component – a sufficiently culpable state of mind on the part of the defendants in denying medical care. *Greeno v. Daley,* 414 F.3d 645, 653 (7th Cir. 2005). To be liable, the defendants must have known of Gee's serious medical need and consciously disregarded that need so as to inflict cruel and unusual punishment upon him. *Johnson v. Doughty,* 433 F.3d 1001, 1010 (7th Cir. 2006).

The Medical Defendants do not put up much of a fight on the objective prong, and the Jail Defendants fully concede that Gee had a serious medical need. A medical condition is sufficiently serious when it has either been "diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would perceive the need for a doctor's attention." *Thomas v. Cook County Sheriff's Dept,* 588 F.3d 445, 452 (7th Cir. 2009). Gee's condition as an insulin-dependent diabetic and schizophrenic, who complained of pain and was not eating, clearly meets this

standard. Accordingly, we focus on whether the defendants were deliberately indifferent.

The Medical Defendants point out that "Gee was not locked into some corner of the jail and ignored by the medical staff." But Gee does not need to show he was literally ignored. *Sherrod v. Lingle*, 223 F.3d 605, 611 (7th Cir. 2000). Gee's treatment may be found constitutionally inadequate if it was "so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate" his condition. *Greeno,* 414 F.3d at 654 (quoting *Snipes v. DeTella,* 95 F.3d 586, 592 (7th Cir. 1996)). Given the evidence presented by the Estate, a reasonable jury could find that the Medical Defendants provided "blatantly inappropriate" treatment. Gee was a severe diabetic who was experiencing unstable blood sugar levels, suffering intense pain, and refusing to eat or hydrate. He started falling to the floor while Anderson tried to administer insulin, and when Estes decided to move Gee to a segregation cell he could not walk. Furthermore, Gee's mother and other inmates allegedly told the jail and medical staff that Gee needed to go to the hospital. Given these and other allegations, there is a genuine issue of material fact as to whether the Medical Defendants were deliberately indifferent to Gee's needs.

Unlike the Medical Defendants, the Jail Defendants are clearly state actors, and they can assert qualified immunity. While the case is closer against the Jail Defendants, a jury could determine that they, too, were deliberately indifferent to Gee's medical

condition. Johnson and Edwards argue that they were entitled to rely on the nurses' judgments, and generally prison officials can defer to medical professionals' opinions. *Burks v. Raemisch,* 555 F.3d 592, 595 (7th Cir. 2009). However, there is an exception when a risk to the prisoner's health is so obvious that a jury may reasonably infer actual knowledge on the part of the defendants. *Vinning-El v. Long,* 482 F.3d 923, 925 (7th Cir. 2007) (citing *Hall v. Bennett,* 379 F.3d 462, 464 (7th Cir. 2004)). This may be one of the rare cases where a layperson would recognize that Gee received treatment so inadequate that Johnson's and Edwards' deference to the nurses was unreasonable. *Johnson,* 433 F.3d at 1011. Gee was clearly in terrible shape, and he was deteriorating right before everyone's eyes. We agree with the district court that it is conceivable Johnson and Edwards should have realized that Gee needed immediate medical care, probably in a hospital.

For these reasons, the district court's judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE ESTATE OF TERRY GEE, JR., Deceased, by Special Administrator, VERA GEE, Plaintiff, vs. MONROE COUNTY SHERIFF Stephen Sharp, BLOOMINGTON HOSPITAL AND HEALTH CARE SYSTEM, INC., WYGONDA ROGERS, JAIL COMMANDER BILL WILSON, CPT. JOHNSON, SGT. EDWARDS, JENNIFER ANDERSON, LPN, TRINA ESTES, LPN, GWEN SUNKEL, LPN, Jointly and severally, Defendants.	)	1:06-cv-94-WTL-TAB

ORDER

(Filed Mar. 31, 2009)

Plaintiff, the Estate of Terry Gee, Jr. ("the Estate"), filed this action following the death on April 5, 2005, of Terry Gee, Jr. ("Gee"), apparently from "progressive respiratory failure related to adult respiratory distress syndrome and perhaps fluid

overload from renal failure." Tennessen Prelim. Report at p. 5.[1] Gee, an insulin-dependent diabetic, was held in custody at the Monroe County Jail from March 18, 2005, through March 31, 2005, where he developed pneumonia and was subsequently transported to the hospital for emergency treatment. The Estate seeks relief under 42 U.S.C. §§ 1983 and 1988 and under state law.

This cause is now before the Court on two separate motions for summary judgment. The first motion was filed by the Jail Defendants, *i.e.*, the Monroe County Sheriff ("Sheriff"), Jail Commander Bill Wilson ("Commander Wilson"), Captain Johnson, and Sergeant Edwards (Docket No. 129).[2] The second motion was filed by the Medical Defendants, *i.e.*, Bloomington Hospital and Health Care System, Inc. ("Hospital"), Wygonda Rogers ("Rogers"), Jennifer Anderson ("Anderson"), Trina Estes ("Estes"), and Gwen Sunkel ("Sunkel") (Docket No. 135). In addition, the Estate, has filed a motion for oral argument

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[1] Gee's mother, Vera Gee, initiated this action as the Special Administrator of Gee's estate. As the Jail Defendants note in their reply brief, Ms. Gee has been withdrawn as the administrator and replaced by Thomas Beeman. *See* Jail Defs.' Reply Br. at 34; Oct. 14, 2008, Order of the Monroe Circuit Court. Therefore, the Clerk is **DIRECTED** to substitute Thomas Beeman for Vera Gee in the caption and remove Ms. Gee's name.

[2] Stephen Sharp is no longer the Monroe County Sheriff Therefore, pursuant to Federal Rule of Civil Procedure 25(d), the proper party is his successor.

on this matter (Docket No. 165). Finally, the Jail Defendants have filed a motion to strike evidence submitted by the Estate with its surreply brief (Docket No. 201). The Medical Defendants have joined in that motion. Each of these motions has been fully briefed and is ripe for ruling.

Because the parties' briefs adequately inform the Court of the issues, the Court concludes that oral arguments is unnecessary. Therefore, the Estate's motion for oral argument is **DENIED**. In addition, as more fully explained herein, the Defendants' motion to strike is **GRANTED**, the Jail Defendants' motion for summary judgment is **GRANTED in part and DENIED in part**, and the Medical Defendants' motion for summary judgment is **DENIED**.

I. PRELIMINARY EVIDENTIARY MATTERS

Defendants have moved to strike the affidavit of Jason Hochman that was submitted with the Estate's surreply brief to counter the arguments made regarding Captain Johnson. Defendants argue that the submission was in violation of Local Rule 56.1(d) because they did not refer to any new evidence in their reply briefs. This Court permits evidence to be submitted with surreplies in limited circumstances where such evidence "responds to the moving party's new evidence." *Lloyd v. Rolls Royce Corp.*, No. IP 01-1775-CHK, 2003 WL 23101791, *3 (S.D. Ind. Aug. 26, 2003). Improper surreply submissions are stricken by this Court. *See id.*

The Court agrees with Defendants that there is no reason justifying the Estate's failure to submit the affidavit with its response in opposition to the motions for summary judgment. Defendants did not offer any new evidence in their reply briefs related to Captain Johnson. Therefore, the Court **GRANTS** the request to strike Hochman's affidavit and will not consider it. In doing so, however, the Court pauses to note that much of the information in the affidavit is simply duplicative of other evidence before the Court.

In addition, Defendants have requested in their reply briefs that the Court strike inadmissible conclusions and opinions of the Estate's tendered experts. Defendants argue that some of the statements of these witnesses are inadmissible legal conclusions or are based on nothing more than speculation. In addition, Defendants contend that the experts' declarations, submitted after the case management plan's deadline for expert reports, should be stricken in their entirety.

The Court agrees that any legal conclusion or unsupported opinion should be stricken and therefore **GRANTS** the request to strike those portions of the experts' reports and statements that contain such information. However, the Court declines to strike any "late" expert submissions. Based on the arguments, the Court concludes that Defendants are not prejudiced by any presumed violation of Federal Rule of Civil Procedure 26(a)(2). Specifically, it appears that the supplemental materials were submitted shortly after the depositions had concluded and the

experts had the opportunity to review all of the evidence in this case. Therefore, any violation was harmless. *See Sherrod v. Lingle*, 223 F.3d 605, 612-13 (7th Cir. 2000). Accordingly, the request to completely strike the supplemental expert materials is **DENIED**.

II. BACKGROUND[3]

A. THE MONROE COUNTY JAIL'S ARRANGEMENTS FOR MEDICAL SERVICES

Prior to Gee's death, the Sheriff and the Hospital entered into an agreement whereby the Hospital would provide medical service to the inmates at the Monroe County Jail. The agreement required the Hospital to provide a jail doctor, an adult nurse practitioner, and four license practical nurses ("LPNs") who would provide medical services seven days a week. At the time of Gee's detention at the jail, the jail doctor was Dr. Tim Alward ("Dr. Alward") and Rogers was the nurse practitioner. Anderson, Estes, and Sunkel were three of the LPNs.

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[3] The Estate makes a number of statements in its responses without providing any citation to evidentiary support. The Court will not scour the record to attempt to find evidentiary support for such Estate's assertions. In addition, the Court has ignored those assertions made by the Estate that are not truly facts but instead are the Estate's opinions or legal conclusions, or are statements or opinions incorrectly attributed to a witness who did not make the statement or opinion.

Under the agreement, Rogers and the LPNs were expected to work at least forty hours per week and the Hospital was expected to provide the jail emergency coverage through the emergency department. Rogers generally worked from 7:00 a.m. to 5:00 p.m. each weekday. The LPNs worked two shifts, one from 4:00 a.m. to approximately 2:00 p.m., and one from 2:00 p.m. to 10:30 or 11:00 p.m., seven days a week. After 11:00 p.m., none of the nurses was scheduled to work; however, some of the jail officers who worked the night shift were trained EMTs.

In addition to the nursing staff, Dr. Alward was available to attend to the medical needs of the inmates. Under the agreement, he was expected to review five percent of patient records each week, to supervise the delivery of medical services at the jail, and to spend a minimum of five hours at the jail each week. He was also on call to consult on individual cases with the adult nurse practitioner or with the LPNs. Further, Dr. Alward had the ability to designate another doctor to oversee his duties if he would be unavailable. Unfortunately, Dr. Alward did not make his normal visit to the jail during Gee's last week at the jail because he planned to be out the country, and he did not designate another doctor to oversee his duties while he was away.

Finally, besides the medical staff, jail officers at the jail were required to undergo and successfully complete the 40-hour jail officer training course offered through Indiana Law Enforcement Academy. At the time of Gee's detention, jail officers were also

required to undergo a 40-hour in-house training and orientation program at the jail after they were hired. The program consisted of three days of classes and two days of hands-on training in the jail blocks. One of the classes involved medical considerations for inmates.

B. GEE'S CONFINEMENT AND TREATMENT

Gee was booked into the Monroe County Jail on March 18, 2005, following his arrest for a theft charge. Gee had been in the jail on other occasions and was known to be a severe diabetic and a schizophrenic. The booking officer, aware of Gee's condition, initially placed him in the detox area so that Gee could be observed periodically and issues regarding Gee's diabetes could be noticed before they "bottomed out." When Gee arrived at the jail, Gee had no medications on him but stated that he was taking Xanax and other drugs.

Throughout Gee's stay at the jail, the medical staff attempted to administer insulin twice a day, although Gee sometimes refused it, and they checked his blood sugar level twice a day. In addition, they administered the various medications and psychotropic drugs that Gee was taking. Gee had contact with a nurse at least twice a day and as many as four times a day while in the jail. His first contact of significance was on March 19, 2005. On that date, Rogers ordered that Gee be placed on a diabetic diet,

administered insulin, and have his blood sugar level checked twice a day. In addition, Anderson saw Gee that day and took his blood sugar readings, which ranged from 325 at 3:45 a.m. to 37 at 8:40 a.m. At 10:10 a.m., after Gee was provided with peanut butter sandwiches and Kool Aid, his blood sugar level was rechecked again and measured 85.

In the meantime, the nursing staff contacted Gee's mother to obtain information about the medications that Gee was taking. Gee's mother subsequently brought Gee's medicine to the jail on March 20, 2005, but Xanax was not among those drugs that she brought.

On March 26, 2005, Mark Estanislau ("Estanislau") became Gee's cellmate. Estanislau has indicated that Gee did not look real sick at that time but did complain about not feeling well. According to Estanislau, Gee stated that he did not want Estanislau to catch what was ailing Gee. In addition, Estanislau asserts that he and Gee conversed a lot during their first couple of days as cellmates. He also noted that Gee refused to his food because he did not feel well and was in pain. After those first couple of days, however, Estanislau believed that Gee's condition began rapidly declining. Estanislau started holding back food from the meal trays for Gee to eat. He noted that Gee was failing out of his bed, pacing in circles, and complaining of severe back pain. Estanislau contends that Gee indicated that he was trying to get his mother and girlfriend to contact the jail and convince the staff to send him to the hospital.

Moreover, Estanislau states that he and other inmates repeatedly told jail officers, including Captain Johnson, and the medical staff about Gee's condition and that Gee needed to go to the hospital for medical treatment. Estanislau's concerns were echoed by another individual, Lloyd Turpin ("Turpin"), who visited Gee during Gee's stay at the jail.

After Estanislau became his cellmate, Gee saw Rogers in the medical unit on March 28, 2005, at 2:30 p.m. This was the first time that Gee sought medical attention from Rogers. At that time, he was coughing, had a sore throat, and had a temperature of 100.3. He reported that his symptoms had started seven days prior to that time. Rogers prescribed Benadryl, Robitussin, and Tylenol. Rogers concluded that Gee was exhibiting flu-like symptoms and expected his symptoms to clear within seven days.

At approximately 4:30 a.m. the next day, Anderson saw Gee during breakfast medication pass. At that time, she checked his blood sugar level. In addition, Anderson noticed that Gee was stepping back and forth, swaying, and was unsteady on his feet. She thought that he appeared to be dizzy. As Andeson was checking Gee's blood sugar, Gee's knees began to buckle and he started to fall to the floor. Anderson managed to assist Gee back to his bunk and, because he felt warm, she took his temperature, which was 103.7 degrees. In addition, Gee's heart rate was high and his respirations were recorded as being 30. Anderson, concerned about the high temperature and instability in controlling Gee's diabetes,

notified Rogers of Gee's condition at 4:45 a.m. Rogers instructed Anderson to give Gee Tylenol, which subsequently lowered Gee's temperature to 100.8. However, Gee's blood sugar was 327 and remained an issue, although Anderson concluded that it was probably because Gee and not eaten anything and had refused breakfast.

Subsequently, at 10:55 a.m. that morning, Rogers saw Gee and concluded that he still had the flu. At that time, Gee complained about back pain and a sore throat and said that his back hurt because of coughing. Anderson claims that Gee also reported that the Robitussin was helping and that he was eating and drinking. Rogers checked Gee's breath sounds and took his temperature, which was 100.2. She then ordered Tylenol, Hydrocodone, Fuaifenesin, and rest and fluid intake to treat Gee's symptoms and stopped the Robitussin. Finally, sometime during that day or the next day, she spoke with Gee's mother who complained about Gee's high temperature and blood sugar levels and expressed concern that Gee needed to go to the hospital. Rogers responded by telling Gee's mother that she was treating Gee's symptoms.

At 4:00 a.m. on March 30, Anderson once again saw Gee. She took his blood sugar and noted that it was 241, which she states was acceptable for Gee. She also gave Gee his medications. According to Anderson, when her shift ended that day she believed that Gee had the flu and reported the same to Estes, who took over Gee's treatment at that time.

During medication pass that evening, Estes spoke with Gee and told him that he needed to take his medication, get rest, and make sure that he ate and drank plenty of fluids. She also told Gee to let staff know if he had any problems. She then measured Gee's respirations, which were short and rapid and checked Gee's blood sugar. She noted that it had been 342 the day before and was now elevated to 588, which was high even for Gee. Based on the blood sugar level, Estes decided to contact Rogers, who had already left for the day. Estes thought that Rogers would send Gee to the hospital at that time. However, Rogers informed Estes that she had been actively treating Gee and was familiar with his condition. When Estes described Gee's symptoms, Rogers concluded that Gee had a bacterial infection and ordered Keflex, an antibiotic. Rogers also instructed Estes to check Gee's blood sugar level again at the 9:30 p.m. medication pass and that if it exceeded 250 to give Gee a double dose of insulin. Finally, Rogers told Estes that she would check on Gee the next morning.

Thereafter, around 9:30 p.m., Estes did another medication pass. Other inmates, including Estanislau, reported stated that Gee had not eaten for the last several days and had passed out that morning from being so weak. Therefore, when Gee came to the medication cart, Estes told him to make sure he ate, took adequate fluids, and took his insulin. Further, at that time she checked Gee's blood sugar level again, which had dropped to 432 but was still high. Pursuant to Rogers's orders, Estes gave Gee a double

dose of insulin, which further dropped the level to 300 sometime the next day. Estes also gave Gee a double dose of Keflex at that time.

Estes then summoned Captain Johnson and expressed her concern that Gee be placed in medical segregation for medical observation. Estes told Captain Johnson that Gee had an infection. In addition, Captain Johnson admits that she overheard inmates saying that Gee was sick and had not been eating. She also asserts that the inmates expressed concern that Gee had the flu and that they did not want to catch it. However, she apparently disputes Estanislau's statement that he and other inmates indicated that Gee needed to be taken to the hospital. In any event, Caption Johnson approved the transfer to segregation. Estes prepared a shift memo for distribution, which stated that "due to unstable diabetic condition, fever, not eating, poor fluid intake, patient should be placed in medical segregation for close observation." Because Gee was too weak to sign the paperwork or walk, Captain Johnson had Gee wheeled to the segregation cell and ordered that a pitcher of water be placed in the cell with Gee. She also signed off on a medical segregation order which indicated that Gee had an extremely high blood sugar level and had been sick with a respiratory condition.

After Gee was placed in the segregation cell, he was observed multiple times by either Estes or jail officers. The jail officers were able to monitor the cell via video surveillance and recorded their observations on a log. Estes and the jail officers noted that Gee

was lying down and appeared to be resting. During her checks, Estes did not see any problems with breathing. When her shift ended and she left at 11:34 p.m., Estes did not expect that Gee's condition would further deteriorate.

Gee was not seen again by medical staff until 4:24 a.m. on March 31, 2005, when he was given his morning dose of medications and a food try by Sunkel. Sunkel also persuaded Gee to drink half of a glass of milk. Gee was pale and ashy in appearance and seemed tired and weak. However, like the other nurses, she thought at the time that Gee had the flu. When she checked on Gee around 6:00 a.m., he was sleeping in a corner and had not eaten any of his food. At that time, Sunkel gave Gee additional medications, including Keflex, and noted that Gee was responsive to verbal commands.

Rogers arrived later that morning and checked on Gee at 7:15 a.m. At that time, Gee was dusky and kind of gray in color, which Rogers concluded was a sign of respiratory involvement. Rogers believed that Gee had developed a case of pneumonia. While she was examining Gee, Sergeant Edwards was outside of the cell for security purposes and observed that a pitcher of water had been placed in Gee's cell per Captain Johnson's instructions. When she finished her examination, Rogers told Sergeant Edwards that Gee needed to be taken to the hospital for pneumonia observation. She did not indicate that Gee needed emergent care or that Sergeant Edwards should call for ambulance. Therefore, Sergeant Edwards made

arrangements for another officer, who was scheduled to do transports that day, to take Gee to the hospital. Sergeant Edwards estimates that he made the request at approximately 7:30 a.m.

When the officer arrived to take Gee to the hospital, Gee was disoriented and had to be wheeled to a waiting minivan. The officer left the jail at approximately 8:04 a.m. and arrived shortly thereafter around 8:08 a.m. He immediately went into the emergency room to summon personnel and when he returned to the minivan a minute later Gee was no longer breathing. Gee was loaded onto a stretcher and taken into the emergency room. Doctors advised that Gee had a severe case of pneumonia, that his kidneys were not working properly, and that he was in critical condition. Gee subsequently died at the hospital on April 5, 2005.

Thereafter, several individuals designated as experts reviewed Gee's treatment records and concluded that Gee's symptoms revealed that he needed obvious medial attention and should have been transported to the hospital sooner. These experts have also opined that Gee received inadequate medical care at the jail. Even Dr. Alward has testified that Gee should have been transported to the hospital sooner and Rogers admits, in retrospect, that she should have handled things differently.[4]

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[4] Interestingly, the consultation report from the hospital indicates that Gee was allergic to peanut butter and codeine, but

(Continued on following page)

III. SUMMARY JUDGMENT STANDARD

Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Summary judgment is the "put up or shut up" moment in a lawsuit. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003), *reh'g denied.* Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co.*

Gee was given peanut butter sandwiches at the jail and Hydrocodone, a codeine analog. None of the experts, or parties for that matter, address whether these circumstances played any significant role in the events and treatment at issue.

v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied,* 520 U.S. 1116 (1997). It is not the duty of the Court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Shields Enters., Inc. v. First Chi. Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied,* 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson,* 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *See Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). "If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would

bear the burden of proof at trial, summary judgment must be granted to the moving party." *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

IV. DISCUSSION

A. QUALIFIED IMMUNITY

The individual Jail and Medical Defendants contend that they are entitled to qualified immunity, which is an "'entitlement not to stand trial or face the other burdens of litigation.'" *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). The privilege is "'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 200-01 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)) (emphasis in original). As a result, the Supreme Court has stressed the importance of resolving immunity questions at the earliest stage of litigation. *Id.* at 201.

In addressing the qualified immunity issue, a court's initial inquiry must be whether, taken in the light most favorable to the nonmovant (in this case, the Estate), the facts alleged show that Defendants' conduct violated a constitutional right. *Saucier*, 533 U.S. at 201. If a violation could be established on a favorable view of the facts, the next step is to ask whether the right was clearly established. This inquiry must be undertaken "in light of the specific

context of the case, not as a broad general proposition." *Id.* In addition, the "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202 (citing *Wilson v. Layne,* 526 U.S. 603, 615 (1999)). The absence of case law that is "precisely on all fours on the facts and law involved" does not mean that a defendant is entitled to qualified immunity. *See Anderson v. Creighton,* 483 U.S. 636. 640 (1987); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1176 (7th Cir. 1994) (citation omitted). Rather, the Court must determine whether the unlawfulness of the conduct was readily apparent in light of pre-existing law. *See Anderson,* 483 U.S. at 640. The Court must not make this determination too abstractly because "government employees must obey the law in force at the time but need not predict its evolution. . . ." *Kernats,* 35 F.3d at 1176 (quoting *Greenberg v. Kmetko*, 922 F.2d 382, 385 (7th Cir. 1991)).

As an initial matter, there is a question of whether the individual Medical Defendants are entitled to assert a defense of qualified immunity. Evidence suggests that they were private contractors and not employees of the Monroe County Jail. The Supreme Court has provided some guidance in the area with its decision in *Richardson v. McKnight*, 521 U.S. 399, 408-09 (1997), where it concluded that private prison guards were not entitled to use the defense of qualified immunity. However, the Supreme Court

specifically indicated in *Richardson* that it was addressing the immunity question narrowly in the context in which it arose, emphasizing that the context did not "involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Richardson*, 521 U.S. at 413. Thus, it is clear that the Supreme Court has not shut the door on the use of the defense by private individuals in all cases. In fact, the Seventh Circuit has addressed the defense in other cases involving private individuals *See e.g., Malinowski v. DeLuca*, 177 F.3d 623, 627 (7th Cir. 1999) (concluding that immunity was unwarranted where facts revealed that private entities carried out their duties largely without government supervision or direction); *cf. Sherman v. Four County Counseling Ctr.*, 987 F.2d 397, 405-06 (7th Cir. 1993) (concluding that private hospital could raise the defense where it treated patient pursuant to court order).

Here, the individual Medical Defendants might be entitled to assert the defense of qualified immunity. Pursuant to the agreement between the Sheriff and the Hospital, they were hired to assist the Sheriff in fulfilling the Sheriff's obligation to care for the detainees under the Sheriff's care. Therefore, the individual Medical Defendants might fit within the narrow exception to the general rule that qualified immunity is reserved for government officials. However, the Court need not explicitly resolve this issue because, even assuming that the individual Medical

Defendants are entitled to assert the defense, it would fail. As explained more fully below, the Court concludes that the facts, when taken in the light most favorable to the Estate, suggest that Gee's constitutional right to receive adequate medical treatment was violated. Consequently, any invocation by the individual Medical Defendants of the defense of qualified immunity would fail.

Similarly, with exception of Commander Wilson, the individual Jail Defendants' assertion of the defense fails. Like the individual Medical Defendants, the individual Jail Defendants cannot get over the hurdle that the facts, when taken in the light most favorably to the Estate, suggest that Gee's constitutional right to receive adequate medical treatment was violated. As explained more fully below, the Estate has alleged a viable claim of deliberate indifference to medical needs and there are factual disputes that must be resolved by a jury, which precludes the granting of summary judgment.

As for Commander Wilson, he is entitled to qualified immunity because there is no basis for liability against him. For one, he had no personal involvement with Gee's treatment. Indeed, he contends that he was unaware that Gee was even being held or that Gee was ill. The Estate nonetheless argues that Commander Wilson had knowledge of Gee's condition because Ms. Gee and Turpin contacted Commander Wilson about that information. It is unclear that either Ms. Gee or Turpin actually spoke directly with Commander Wilson. But even if they did,

Commander Wilson has stated that he would have contacted the medical staff to inquire about the matter and requested medical treatment. It is well-established that a jail officer is entitled to defer to the judgment of a medical professional with regard to the appropriate way to treat an inmate. *See Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009) (citing *Durmer v. O'Carroll*, 991 F.2d 64 (3d Cir. 1993), and *Johnson v. Doughty*, 433 F.3d 1001, 1011 (7th Cir. 2006)). Therefore, under the circumstances, the Court concludes that the Estate cannot demonstrate the Commander Wilson violated Gee's constitutional right to receive adequate medical care. As such, Commander Wilson is entitled to qualified immunity.

B. DELIBERATE INDIFFERENCE TO MEDICAL CARE

In order to prevail on its § 1983 claim denial of deliberate indifference to medical care, the Estate must prove "deliberate indifference to [Gee's] serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).[5] "Deliberate indifference" means the "unnecessary and wanton infliction of pain." *Id.* at 104 (citing

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[5] Technically, because he was not a prisoner but a pretrial detainee, Gee was protected under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 n. 16 (1979)). However, in determining whether Gee's rights were violated, the analysis is identical to that applied under the Eighth Amendment. *See, e.g., Barrie v. Grand County*, 119 F.3d 862, 868 (10th Cir. 1997); *Hare v. City of Corinth*, 74 F.3d 633, 643 (5th Cir. 1996).

Gregg v. Georgia, 428 U.S. 153, 157 (1976)). The test for considering such claims contains both an objective and subjective element. *See Farmer v. Brennan,* 511 U.S. 825, 834 (1994). In order to satisfy the objective component, "the deprivation must be, objectively, 'sufficiently serious.'" *Id.* (quoting *Wilson v. Seiter,* 501 U.S. 294, 298 (1991)). A prison official's actions must result in the denial of "'the minimal civilized measure of life's necessities.'" *Id.* (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The subjective component requires a showing that the prison official knew of a substantial risk of serious injury to the prisoner but nevertheless failed to take reasonable measures to prevent harm from occurring. *See Henderson v. Sheahan,* 196 F.3d 839, 845 (7th Cir. 1999). In addition, "[t]he officials must know of and disregard an excessive risk to inmate health; indeed they must 'both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists' and 'must also draw the inference.'" *Greeno v. Daley,* 414 F.3rd 645, 653 (7th Cir. 2005) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

Notwithstanding the foregoing, neither medical malpractice nor differences in opinion over medical judgment on appropriate treatment amounts to deliberate indifference. *See Estelle,* 429 U.S. at 106-07. In fact, "[t]o infer deliberate indifference on the basis of physician's treatment decision, the decision must be so far afield of accepted professional standards as to raise the inference that it was not actually based on a

medical judgment." *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006). Moreover, as previously noted, a jail officer is entitled to defer to the judgment of a medical professional with regard to the appropriate way to treat an inmate. *See Burks,* 555 F.3d at 595. Nonetheless, a plaintiff can still establish deliberate indifference "by inference from circumstantial evidence, including evidence that the risk was so obvious that a jury may reasonably infer actual knowledge on the part of the defendants." *Vinning-El v. Long,* 482 F.3d 923, 924-25 (7th Cir. 2007) (citations omitted).

Here, with respect to Captain Johnson and Sergeant Edwards, the Estate essentially argues that this case falls under an exception to the general rule because it is one of the "unusual case[s] where it would be evident to a layperson that a prisoner is receiving inadequate or inappropriate treatment" and therefore it is unreasonable for prison officials to "rely on the judgment of medical professionals." *Johnson,* 433 F.3d at 1010 (quoting from *Bond v. Aguinaldo,* 228 F. Supp. 2d 918, 920 (N.D. Ill. 2002)). The Court agrees that there is evidence that, if believed by a jury, suggests that Captain Johnson and Sergeant Edwards were confronted with a case of an inmate who was obviously suffering from an ailment that required immediate treatment. Specifically, various laypersons that included Estanislau, Turpin, and Ms. Gee allegedly recognized that Gee needed immediate medical care beyond what was being administered at

the jail and expressed their concern to jail and medical staff.[6] If these laypersons reached their conclusions based on their observations of Gee, it is at least conceivable that the jail staff should have recognized the potential need for immediate care by the hospital. There is no question that they had the authority to override the nursing staff's recommendations and request that Gee be transferred to the hospital if Gee was facing a serious medical issue. Thus, if the Estate's witnesses are believed, a jury could find that Captain Johnson and Sergeant Edwards turned a blind eye to Gee's condition and improperly deferred to the medical staff. Therefore, the Court concludes that summary judgment cannot be granted in favor of Captain Johnson and Sergeant Edwards.

Furthermore, if it was obvious to a layperson that Gee needed more serious medical attention, then it should have been even more clear to a trained medical professional. Gee's medical records might be said to paint an alarming picture of an inmate with fluctuating and unstable blood sugar levels whose health was rapidly declining in the jail. In addition, Gee's subjective complaints of intense pain, coupled with the fact that he was a severe diabetic who was not eating or properly hydrating, arguably should have raised more concern than it did. All of the Estate's tendered experts agree that more should

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[6] By March 30, 2005, even Estes recognized that possibility, although a later consultation with Rogers convinced her otherwise.

have been done, and their opinions are supported at least in part by Dr. Alward and Rogers own retrospective comments. Therefore, the Court cannot enter summary judgment in favor of the Medical Defendants.

C. THE SHERIFF'S POTENTIAL LIABILITY

In addition to Captain Johnson and Sergeant Edwards, the Estate seeks to recover from the Sheriff for Gee's death. The Amended Complaint appears to raise several, somewhat conflicting rationales for imposing liability against the Sheriff. For instance, the Estate claims that the medical policies were deficient while at the same time arguing that the absence of a specific policy or policies led to Gee's death. The Amended Complaint also generally raises a failure to train theory. However, based on the Estate's response to the Jail Defendants' motion and the statements of the experts upon whom the Estate relies in opposition for the official liability issue, it appears that the Estate's claim boils down to allegations that the Sheriff failed to have a better policy that specifically addressed how officers were to monitor the medical needs of inmates in segregation, and that the Sheriff failed to provide better training on recognizing and responding to emergency or life threatening ailments.

The Estate's official capacity claim against the Sheriff is treated as a claim against Monroe County

itself. *See Grieveson v. Anderson,* 538 F.3d 763, 771 (7th Cir. 2008). Counties and other governmental entities may not be held liable for the unconstitutional acts under a *respondeat superior* theory, but rather are liable for those acts only if they were carried out pursuant to an official custom or policy. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Lewis v. City of Chicago*, 496 F.3d 645, 656 (7th Cir. 2007). In order to prevail on its claim against the Sheriff, the Estate must prove that: (1) Gee suffered a deprivation of a federal right (2) as a result of either an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority (3) which was the proximate cause of Gee's death. *See Monell,* 436 U.S. at 690-91; *Frake v. City of Chicago,* 210 F.3d 779, 781 (7th Cir. 2000).

In addition, the Estate can only prevail on its failure to train theory if the failure to train amounted to "deliberate indifference" to Gee's rights. *See City of Canton v. Harris,* 489 U.S. 378, 388 (1989). The Estate is required to demonstrate that the Sheriff had actual or constructive knowledge that such a failure to train would likely result in constitutional deprivations. *See Robles v. City of Fort Wayne,* 113 F.3d 732, 735 (7th Cir. 1997). This could be accomplished by presenting evidence of a pattern of constitutional violations, or where a clear constitutional duty is implicated in recurrent situations that officers are likely to face. *See id.* Thus, the following test is useful in making that showing: (1) the training provided to jail officers was, in fact, inadequate;

(2) the Sheriff is culpable because there was an obvious need for training and he consciously chose not to provide adequate training; and (3) the Sheriff's choice not to provide adequate training was the "moving force" behind the alleged constitutional deprivations. *See Grieveson*, 538 F.3d at 771; *Kindle v. City of Harvey,* No. 00 C 6886, 2002 WL 230779, *3 (N.D. Ill. Feb. 15, 2002) (citing *Monell,* 436 U.S. at 694).

The Jail Defendants present multiple arguments explaining why the Sheriff is entitled to summary judgment. Their first contention can be easily dispensed. The Jail Defendants argue that there can be no official liability because none of the individual jail officers committed a constitutional violation. Because the Court has concluded that there are disputed issues of fact on that point, the argument is unpersuasive.

The Jail Defendants' remaining argument is more compelling. They argue that even if there was a constitutional violation, the office of the Sheriff cannot be liable because there is no unconstitutional policy, custom, or practice and no evidence of any deliberate indifference to training needs. They note that the Sheriff's medical policy is not unconstitutional because it does not encourage deliberate indifference to medical needs but indicates that treatment should be provided and that inmates facing emergency or life threatening ailments should be transported to the hospital. Further, the Jail Defendants contend that there is no evidence of any widespread practice or custom of tolerating or condoning

deliberate indifference to an inmate's medical needs and no evidence of prior incidents of constitutional deprivations that would have placed the Sheriff on notice of the need for additional training. Finally, the Jail Defendants note that training was provided and that the Estate is really pressing a case for better or more specialized training, allegations which do not provide the basis for official liability. *See, e.g., Palmquist v. Selvik,* 111 F.3d 1332, 1345 (7th Cir. 1997); *Estate of Perry v. Boone County Sheriff,* No. 1:05-cv-1153, 2008 WL 694696, *13-14 (S.D. Ind. March 12, 2008).

The Court agrees with the Jail Defendants that the Sheriff is entitled to summary judgment. The undisputed evidence shows that all jail officers hired by the Sheriff were required to take the training course offered by the Indiana Law Enforcement Academy. In addition, all officers were required to' complete in-house training and an orientation program that included on-the-job training and instruction on medical considerations for inmates. These facts negate any inference that the Sheriff was deliberately indifferent to training needs. *See, e.g., Tapia v. City of Greenwood,* 965 F.2d 336, 339 (7th Cir. 1992) (noting that SWAT team's unconstitutional entry into home could not be said to have been done pursuant to official policy where officers attended training academies and had training on warrants).

Moreover, prior to Gee's death, there is no evidence that any inmate had died or sustained serious injury from a failure to secure proper medical

attention, including complications from diabetes or pneumonia. In that respect, this case is similar to the circumstances in *Hirsch v. Burke,* 40 F.3d 900 (7th Cir. 1994), where a diabetic died from insulin shock. In *Hirsch,* because there was no evidence that the defendants were on notice of any pattern of similar violations resulting from inadequate training, the Seventh Circuit found that plaintiff's failure to train theory failed. *See id.* at 904-05. The Seventh Circuit concluded that, at most, the case was one of simple negligence, which is insufficient to establish a § 1983 claim. *See id.* at 905. *See also Palmquist v. Selvik,* 111 F.3d 1332, 1345 (7th Cir. 1997) (rejecting argument that specialized training was necessary because it is contrary to "better or more" training scenarios that are insufficient to establish a failure to train theory). Although the Court is not putting its imprimatur on the Sheriffs policies or training procedures, the Court concludes that the circumstances are similar to the facts and circumstances of those cases that have concluded that there is no official liability. Therefore, the Court finds that the Sheriff is entitled to summary judgment.

D. STATE LAW CLAIMS

In addition to the federal claims under § 1983, the Jail Defendants have moved for summary judgment on the Estate's state law claims. The Jail Defendants first argue that the state law claims against the individual officers should be dismissed pursuant to Indiana Code § 34-13-3-5(b), which bars claims

against government employee who have acted within the scope of their employment.[7] There is no dispute that the jail officers were acting within the scope of their employment at all relevant times.

The Jail Defendants next argue that the Sheriff cannot be liable on any state law claim of negligence because he discharged his duty under Indiana Codee § 36-2-13-5(a)(7) to provide access to medical care. The Jail Defendants argue that, because medical care was provided, the Estate must show that the Sheriff knew that the medical staff had a reputation for not providing appropriate medical care or misdiagnosing ailments. *See Trout v. Buie,* 653 N.E.2d 1002, 1008 (Ind. Ct. App. 1995). The Jail Defendants contend that there is no evidence demonstrating that the medical staff had a history or reputation of failing to provide appropriate treatment or incorrectly diagnosing ailments or that the Sheriff breached the duty to provide access to medical care.

Finally, the Jail Defendants argue that the Sheriff cannot be held vicariously liable for any potential medical malpractice that might have been committed

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[7] An exception to this general grant of immunity is the use of excessive force. *See Kemezy v. Peters,* 622 N.E.2d 1296, 1297 (Ind. 1993). Although the Amended Complaint includes references to "excessive force," there are no factual circumstances in the case suggesting that such a claim is warranted. Therefore, even if the Estate is asserting such a claim, the record before the Court demonstrates that the Jail Defendants would be entitled to summary judgment on that claim.

by the medical staff. They assert that the Sheriff is immune from such liability pursuant to Indiana Code § 34-13-3-3(10), which shields a governmental entity from liability for acts committed by anyone other than the governmental employee or its employees. The Jail Defendants point out that this protection extends to non-delegable duties that the governmental entity has contracted out to a private party where there is no showing that the governmental entity negligently supervised a negligent independent contractor.

See City of Vincennes v. Reuhl, 672 N.E.2d 496 (Ind Ct. App. 1996); *Shand Mining Co. v. Clay County Bd. of Comm'rs*, 671 N.E.2d 477 (Ind. Ct. App. 1996). *But see Hinshaw v. Bd. of Comm'rs of Jay County*, 611 N.E.2d 637 (Ind. 1993) (providing that immunity applies to situation where vicarious liability might be imposed for conduct of agents who are not employees or subject to ay right of control). The Jail Defendants argue that there is no basis for concluding that the Sheriff negligently supervised the medical staff.

The Estate has failed to respond to any of these arguments. Therefore, the Court deems that the state law claims against the Jail Defendants have been abandoned. Moreover, the Court finds that there is a legal basis supporting each of the Jail Defendants' arguments. Accordingly, the Court concludes that the Jail Defendants are entitled to summary judgment on the state law claims.

V. CONCLUSION

For the foregoing reasons, Plaintiff's motion for oral argument (Docket No. 165) is **DENIED**.

The motion is strike the evidence submitted with Plaintiff's surreply (Docket No. 201) is **GRANTED**. In addition, the Defendants' requests in their reply briefs to strike portions of Plaintiffs' experts' opinions are **GRANTED in part and DENIED in part**.

The Jail Defendants' motion for summary judgment (Docket No. 129) is **GRANTED in part and DENIED in part**. All claims against the Monroe County Sheriff and Jail Commander Bill Wilson are **DISMISSED with prejudice** and their names may be removed from the caption as defendants in this case. In addition, all state law claims against the Jail Defendants are **DISMISSED with prejudice**. Only Plaintiff's claims arising under 42 U.S.C. §§ 1983 and 1988 remain pending against Captain Johnson and Sergeant Edwards.

The Medical Defendants' motion for summary judgment (Docket No. 135) is **DENIED**. Finally, the Clerk is **DIRECTED** to remove Vera Gee from the caption and as a party in the case. Thomas Beeman is **SUBSTITUTED** for Vera Gee as the Special Administrator of the Estate.

IT IS SO ORDERED: 03/31/2009

/s/ William T. Lawrence
Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Distribution attached.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 15, 2010

Before

TERENCE T. EVANS, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

SAMUEL DER-YEGHIAYAN, *District Judge**

No. 09-1895

ESTATE OF TERRY GEE, JR., Deceased, by Special Administrator, Thomas Beeman, *Plaintiff-Appellee.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
v.	No. 1:06-CV-00094-WTL-TAB
JUDY JOHNSON, Captain, et al., *Defendants-Appellants.*	William T. Lawrence, *Judge.*

ORDER

On consideration of the petition for rehearing filed March 1, 2010, all of the judges have voted to

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* The Honorable Samuel Der-Yeghiayan, United States District Judge for the Northern District of Illinois, sitting by designation.

deny rehearing. It is therefore ordered that the petition for rehearing is DENIED.